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the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied

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**TOMLIN, Sr. J.**

Independence One Mortgage Corporation (“plaintiff”) has appealed from an order of the Chancery Court of Shelby County granting both the motion to dismiss of State Auto Insurance Companies and the motion for summary judgment of Beth Brooks (“defendants” or by name).<sup>2</sup> The sole issue presented by plaintiff on appeal is whether the trial court erred in holding that State Auto owed plaintiff no duty to pay it damages resulting from a breach of a construction contract between a third party and the estate of plaintiff’s insured. We find no error and affirm.

Before proceeding we are constrained to observe that although plaintiff appealed from the trial court’s order dismissing both defendants, plaintiff raised no issue in its brief before this court concerning defendant Brooks, nor did it contend in any way that the award of summary judgment in favor of Brooks should be reversed. In light of these deficiencies, we treat the appeal as to Brooks to have been abandoned and any claim for relief waived. T.R.A.P. 13(b); Bank of Crockett v. Cullipher, 752 S.W.2d 84, 86 (Tenn. App. 1988).

Inasmuch as plaintiff’s suit against State Auto was dismissed by the trial court upon State Auto’s motion for failure to state a claim, in considering the issue presented on appeal we are required to take the allegations of plaintiff’s complaint as true, and to

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<sup>2</sup>Although Homer Sowell, d/b/a H/S Construction, was named as a party in the complaint, there is no evidence in the record that Sowell made an appearance in this action. In its order granting State Auto’s motion to dismiss and Beth Brooks’ motion for summary judgment, the trial court held that because there was no just reason for delay or entry of a final judgment, its judgment was made final. T.R.C.P. 54.02.

construe them liberally in favor of plaintiff.

Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690, 691 (Tenn. 1984).

Following the above guideline, the amended complaint of plaintiff presents the following facts: Prior to this litigation, plaintiff was the holder of a promissory note in the principal amount of \$31,245.19, which was secured by a first lien against real estate located at 3643 Big Bend in Memphis. The note and mortgage was signed by Cordia Johnson, who was the owner of the real estate. The residence on the property was insured against fire loss by an insurance policy issued by State Auto, which named plaintiff as an additional insured.

On April 3, 1991 the residence was severely damaged by fire. Cordia Johnson died in this fire. Sandra Ingram was appointed administratrix of Johnson's estate. Homer Sowell, d/b/a H/S Construction, submitted a proposal to repair the premises at 3643 Big Bend to Sandra Ingram, as administratrix, which she accepted on September 17, 1991. The total amount to be paid to H/S Construction under this contract by the estate of Cordia Johnson was \$54,023.00, which was to be paid in three parts: one-third upon completion of tear out and clean up; one-third upon completion of the framing, roofing, and sheetrock; and the remaining one-third was due upon completion of the job.

At some point following the execution of this contract of repair, State Auto issued checks totaling \$53,544.00 to Beth Brooks, the attorney representing the estate of Cordia Johnson. The checks were made payable to the Estate of Cordia Johnson, Beth Brooks, attorney, and H/S Construction. Beth Brooks paid all of the funds to H/S Construction in a manner contrary to the terms of the contract, and before H/S Construction had performed half of the construction work required to repair the premises. After receiving payment in full from Brooks, H/S Construction refused to perform any further repair work. In order to protect its mortgage on the property, plaintiff was required to hire another contractor to complete the construction work to repair the fire damage to the property, at a cost to plaintiff of \$23,649.25.

Plaintiff contends that it entered into an agreement with State Auto under which State Auto agreed to pay for all reconstruction of the residence located on the insured premises, and was thereby obligated to comply with the terms of the construction contract between H/S Construction and the administratrix of the Johnson estate. This contract as alleged by plaintiff emanated from a letter written to counsel for State Auto by an assistant vice-president of plaintiff, which reads in pertinent part as follows:

In consideration of the agreement of State Auto Insurance Companies to continue funding reconstruction of the home located at 3643 Big Bend, Memphis, Tennessee, 38116, and further in consideration of State Auto's forbearance to file an interpleader action, the undersigned authority for Independence One Mortgage Corporation, agrees to on behalf of Independence One Mortgage Corporation, to hold harmless State Auto from any costs, loss, expenses, deficiency or other liability that may be associated with any deficiency or shortage upon foreclosure by the undersigned on this premises.

We expressly agree and understand that State Auto owes us no duty other than to fund the balance of construction of the home pursuant to its contract with the insured, the Estate of Cordia Johnson.

Taking all of the above allegations in plaintiff's complaint as true, we are of the opinion that plaintiff has failed to state a claim upon which relief can be granted against State Auto. The obvious breach of the construction contract, either negligently or intentionally, was the failure of the administratrix of Johnson's estate and her attorney to comply with the payout provisions of the contract. State Auto never was a party to the construction contract between H/S Construction and Johnson's estate, nor is there any allegation whatsoever that State Auto was aware of the payout provisions of this contract.

The only contract State Auto had with Cordia Johnson and with her personal representative following her death was its contract of insurance. This contract of insurance, which is not in the record, insured the premises against fire loss. The policy did not require State Auto to fund the construction in any particular increments, nor did it require State Auto to instruct the estate's attorney how to manage the affairs of the estate. We repeat the following language from the "contract" relied upon by plaintiff:

We [plaintiff] expressly agree and understand that State Auto owes [plaintiff] no duty other than to fund the balance of construction of the home pursuant to its contract with the insured, the Estate of Cordia Johnson. (emphasis added).

There is no allegation that State Auto did not comply with the terms of the only contract to which it was a party—its insurance policy issued to Cordia Johnson. We find this issue to be without merit.

Accordingly, the judgment of the trial court is affirmed. Costs in this cause on appeal are taxed to plaintiff, for which execution may issue if necessary.

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TOMLIN, Sr. J.

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FARMER, J.

(CONCURS)

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LILLARD, J.

(CONCURS)